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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARK CHOI, **Plaintiff and Appellant,** **v.** **JANET M. HARVEY,** **Defendant and Respondent.**	**A100533/A101406** **(Solano County Super. Ct. No. SL012225)**

In these consolidated appeals, Mark Choi (Choi) contends the trial court erred in finding that respondent Janet M. Harvey was not liable for breach of contract or negligent misrepresentation in connection with the sale of her husband's dental practice, and in declining to impose a constructive trust against her assets. Choi also seeks reversal of an order awarding Janet Harvey recovery for her attorney fees and court costs. We will affirm both the judgment and the order.

I. FACTS AND PROCEDURAL HISTORY

A. THE SALE OF HARVEY'S DENTAL PRACTICE

Choi, a licensed California dentist, entered into negotiations with Dr. Edward L. Harvey, then husband of respondent Janet Harvey, for the purchase of Edward Harvey's pedodontic dental practice in 1997. Choi and Edward Harvey were represented by their respective attorneys. Janet Harvey did not participate in the negotiations.

Choi and Edward Harvey signed a Dental Practice Sale Contract (Contract) on August 16, 1997. Edward Harvey and his corporation were identified as the "SELLER," and Choi was named as the "BUYER." In the Contract, Edward Harvey warranted that

the financial data he provided to Choi concerning the practice was true, agreed to advise Choi of any material or significant change that might materially alter the desirability of the practice, and represented that he had received certain specified gross revenue in the preceding three years.

The Contract also contemplated Janet Harvey's consent to the sale of the practice. Specifically, as part of Edward Harvey's warranties as seller, paragraph 11G of the Contract read: "The Seller shall provide the Buyer with a spousal consent statement for the sale of the Practice, if applicable, as required by California community property law." As part of Choi's warranties, paragraph 12G of the Contract stated: "The Buyer shall provide the Seller with a spousal consent for the sale of this Practice, if applicable."

Accordingly, a document entitled "Spousal Consent" (Spousal Consent) was attached as an addendum to the Contract. The Spousal Consent, signed by Janet Harvey on the Contract date of August 16, 1997, read in pertinent part: "I, the spouse of Edward L. Harvey D.M.D., consent and agree to the Dental Practice Sale Contract between Edward L. Harvey D.M.D., Inc., Edward L. Harvey D.M.D. as Seller and Mark Choi D.D.S. as Buyer." According to Janet Harvey's testimony, she signed the Spousal Consent at her husband's request, because she agreed with his desire to retire. She asked no questions about the sale before signing.

Choi paid the purchase price of $523,500, and in September 1997 assumed operation of the dental practice. Several months later, however, he discovered from news reports that Edward Harvey had pleaded guilty to violating federal health care fraud statutes by overbilling the TRICARE military dental insurance plan. According to Edward Harvey's May 1998 plea agreement, he had defrauded the plan by billing for services that "he knew were not medically necessary." Furthermore, the administrator of the plan, United Concordia Companies, Inc. (United Concordia), had advised Edward Harvey of these billing improprieties before he sold the practice to Choi.

Meanwhile, Janet Harvey had filed a petition for dissolution of her marriage with Edward, and both the petition and his response listed the proceeds of the sale of the dental practice as a community asset. In October 1998, Choi filed a motion seeking to

join the dissolution action and file a complaint for damages against the Harveys. The motion was denied.

B. CHOI'S LAWSUIT AGAINST THE HARVEYS

Choi filed a civil lawsuit against Janet and Edward Harvey in March 1999. The operative pleading at trial was Choi's second amended complaint, filed in September 2001. It alleged causes of action for intentional misrepresentation and concealment against Edward Harvey only. As to both defendants, it alleged causes of action for breach of contract and negligent misrepresentation. In addition, the second amended complaint requested imposition of a constructive trust in the amount of the sale proceeds.

1. August 2002 Statement of Decision on Liability and Compensatory Damages

The trial was bifurcated, with the liability and compensatory damages phase commencing in February 2002. After completion of this phase the following March, the trial court issued its tentative statement of decision, to which Choi filed objections on numerous grounds. The court issued its final statement of decision on August 6, 2002.

The trial court found Edward Harvey liable to Choi on all four causes of action, based on misrepresentations in the Contract concerning the finances of the practice, an audit by United Concordia before the sale to Choi, and Edward Harvey's scheme to defraud United Concordia. Compensatory damages were awarded in the amount of $28,041, along with prejudgment interest of $19,769. The court also found that Choi had proven Edward Harvey's fraud by clear and convincing evidence, permitting Choi to proceed against him for punitive damages.

As to the causes of action asserted against Janet Harvey, the court found she was not liable individually for breach of contract or negligent misrepresentation, because she was not a party to the Contract and did not directly make misrepresentations to Choi in connection with the sale. The court ruled, however, that her interest in the community property estate was liable, pursuant to Family Code section 910, for the judgment against Edward Harvey. The court made no express findings as to unjust enrichment, Choi's request for imposition of a constructive trust, or the alleged agency relationship between the Harveys.

2. Judgment and Further Proceedings as to Edward Harvey

The court subsequently awarded Choi punitive damages against Edward Harvey in the amount of $75,000. Judgment was entered as to Edward Harvey, and he appealed, contending the evidence was insufficient to establish fraud and breach of contract and inadequate to support the award of compensatory and punitive damages. Choi cross-appealed, contending the compensatory and punitive damage awards were insufficient. In appeal number A101674, we affirmed the judgment.

As the prevailing party, Choi filed a motion to recover from Edward Harvey his attorney fees in an amount in excess of $484,000. The court awarded Choi $150,000. Choi appealed, contending the award should have been greater. Edward Harvey cross-appealed, contending it should have been lower. We address those issues in a separate opinion in appeal number A103327.

3. Judgment as to Janet Harvey and Janet Harvey's Request for Fees and Costs

A separate judgment as to Janet Harvey was entered on August 6, 2002, consistent with the statement of decision of the same date. In addition to the Family Code section 910 finding, the judgment read: "Plaintiff, MARK CHOI, shall take nothing from Defendant JANET HARVEY and finds in favor of Defendant JANET HARVEY, together with her costs of suit herein."

Janet Harvey thereafter filed a memorandum of costs, seeking $10,621.51. Choi filed a motion to strike Janet Harvey's memorandum of costs, on the ground she was not the prevailing party, along with an alternative motion to tax costs, which challenged costs purportedly incurred for deposition transcripts and fees of a mediator and discovery referee. After taxing a $125 deposition appearance fee, the trial court approved the remaining costs of $10,496.51.

Janet Harvey also filed a motion for attorney fees, pursuant to an attorney fee provision in the Contract and Civil Code section 1717. Choi opposed the motion. The court granted it, finding that neither party obtained an unqualified victory and, in its discretion, Janet Harvey was the prevailing party. Out of the $238,327.39 initially sought (later amended to $235,739.20), the trial court awarded $65,000.

The order denying Choi's motion to strike costs, granting in part and denying in part Choi's motion to tax costs, and granting Janet Harvey's motion for attorney fees, with an aggregate award in favor of Janet Harvey for $75,496.51, was entered on December 23, 2002.

4. Choi's Appeals Herein Against Janet Harvey (A100533/A101406)

Choi appealed from the judgment entered as to Janet Harvey. In the proceeding known as A100533, Choi asserts: (1) Janet Harvey was individually liable for the breach of the contract for sale of the dental practice because she was a party to the contract; (2) Janet Harvey is liable for breach of contract and negligent misrepresentation because Edward Harvey was acting as her agent; (3) Janet Harvey is individually liable to Choi for unjust enrichment because she received and retained proceeds of the sale obtained by Edward Harvey's fraud; and (4) a constructive trust should have been placed on Janet Harvey's assets.

Choi also appealed from the December 23, 2002, order awarding attorney fees and denying his motion to tax or strike costs. In appeal number A101406, Choi contends: (1) the order awarding attorney fees is erroneous because neither the Contract nor Civil Code section 1717 provides for a fee award in litigation between Janet Harvey and Choi, she was not the prevailing party, and no fees were proven to relate to the contract action; and (2) the order denying Choi's motion to strike or tax costs is erroneous because Janet Harvey was not the prevailing party and certain costs were not allowable.

We consolidated appeals A100533 and A101406 by order of March 14, 2003. This opinion addresses the issues raised in these consolidated appeals.

II. DISCUSSION

We discuss each of Choi's contentions in turn.

A. JANET HARVEY'S LIABILITY FOR BREACH OF CONTRACT

In concluding that Choi had not proven a breach of contract claim against Janet Harvey, the trial court found: "JANET HARVEY is not liable individually for breach of contract. While JANET HARVEY signed a consent to the practice purchase agreement,

she had no involvement in the negotiations, made no promises or representations regarding it, and was not a party to the contract." Choi contends this was error.

The Contract did not identify Janet Harvey as a party, and the Contract's definition of "Seller" does not refer to her. In its introductory paragraph, the Contract provides that it was entered into "by and between Edward L. Harvey D.M.D. Inc., and Edward L. Harvey D.M.D., as to the interest each may have, hereinafter referred to jointly as the 'Seller,' and Mark Choi D.D.S., hereinafter referred to as 'Buyer.'" Furthermore, Janet Harvey did not sign the Contract.

Choi nevertheless contends that Janet Harvey was liable for breach of contract because she signed the spousal consent, which read: "I, the spouse of Edward L. Harvey D.M.D., *consent and agree to the Dental Practice Sale Contract* between Edward L. Harvey D.M.D., Inc., Edward L. Harvey D.M.D. as Seller and Mark Choi D.D.S. as Buyer." (Italics added.)

The language of the Spousal Consent, viewed within the context of the Contract as a whole, indicates that the parties had not intended Janet Harvey would have the obligations of the seller. (See Civ. Code, §§ 1636-1638, 1641.) According to the terms of the Contract, the Spousal Consent was devised to render compliance with "California community property law." Its ostensible purpose, as Janet Harvey insists, was to comply specifically with Family Code section 1100, subdivision (d), which requires a spouse who has primary management and control of a business to give "prior written notice to the other spouse of any sale" of the business.[1] It is undisputed that the dental practice was a

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[1] Family Code section 1100, subdivision (d) provides: "a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes), whether or not title to that property is held in the name of only one spouse."

community asset Edward Harvey operated and managed, and was thus subject to Family Code section 1100, subdivision (d).

Choi argues that the Spousal Consent was phrased in terms of her agreeing to the "Dental Practice Sale Contract," rather than a mere acknowledgement of notice of the sale as required by Family Code section 1100. In context, however, this choice of language does not compel the conclusion that the contracting parties—let alone Janet Harvey herself—intended for her to assume the obligations of the Contract or adopt its warranties and representations. If that had been the parties' actual intent, one would expect the Spousal Consent to state so clearly. Instead, the Spousal Consent reiterated that Edward Harvey and his corporation—not Janet Harvey—constituted the seller under the Contract. Further, we note, the Spousal Consent was executed on the same date as the Contract. It is quite unreasonable to suggest that the parties and their respective counsel elected to make Janet Harvey a contracting party or its equivalent by: not identifying her as a party, not identifying her as a seller, not explicitly stating she was responsible for the seller's obligations, and contemporaneously having her sign a Spousal Consent for the express and limited purpose of satisfying community property requirements.

In any event, substantial extrinsic evidence supports the conclusion that Janet Harvey did not intend, by executing the Spousal Consent, to become a party to the Contract or otherwise assume individual responsibility for the seller's obligations. Janet Harvey testified she signed the Spousal Consent at Edward's request, merely because she agreed with her husband's desire to retire. She asked no questions about the sale, and from this it can be inferred that she was not undertaking to assume any obligations under the Contract or warrant its representations. At bottom, Janet Harvey's execution of the Spousal Consent did not subject her to liability for breach of the Contract.

Choi's other arguments in regard to the breach of contract claim are equally unpersuasive. First, he notes that Janet Harvey accepted the sale proceeds jointly with Edward and thereafter retained and continued to claim her interest in them after she learned of his fraud on Choi. (In particular, he argues, the sale proceeds were received

into a community-owned bank account, she claimed the proceeds as community property in their dissolution action, and she never offered to return any portion to Choi after she became aware of his claims.) Choi contends this constitutes consent to the obligations of the Contract under Civil Code section 1589, which provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Civil Code section 1589, however, merely establishes a means of accepting an offer: one who is offered certain benefits at a price, and then receives them in silence despite the opportunity to reject them without expense or material inconvenience, may be deemed to have accepted the terms of the offer. (See *Durgin v. Kaplan* (1968) 68 Cal.2d 81, 90-91.) But Choi made no offer to Janet Harvey, let alone one that would expose her to individual liability for breach of the Contract.

Second, Choi claims it was his understanding that Edward Harvey was acting on Janet Harvey's behalf in connection with the sale of the practice. His argument, essentially, is that Edward was Janet Harvey's ostensible agent when he entered into the Contract. Of course, that is entirely inconsistent with the language of the Contract itself. For this and other reasons we discuss *post,* in the context of Choi's negligent misrepresentation claim, Choi's agency argument is meritless.

Third, Choi argues that Civil Code section 1565, which sets forth the elements of a binding contract, have all been met, establishing a contract between Choi and Janet Harvey. One of the elements identified in Civil Code section 1565, however, is mutual consent. As discussed *ante*, there is sufficient evidence to support the court's conclusion that Janet Harvey did not consent to be personally responsible for the seller's obligations under the Contract. There was, therefore, no mutual consent to create the binding contract Choi asserts. Or, to put it somewhat differently, even if some binding contract had been formed between Choi and Janet Harvey as a result of her execution of the Spousal Consent, it could not be construed in the manner Choi urges as a matter of law.

Choi has failed to establish error as to his breach of contract claim against Janet Harvey.

B. JANET HARVEY'S LIABILITY FOR NEGLIGENT MISREPRESENTATION

Choi established at trial that certain statements in the Contract were misrepresentations of fact. The court ruled, however, that these misstatements did not render Janet Harvey individually liable for negligent misrepresentation: "there is no evidence that JANET HARVEY made any representations during the sale of the practice, let alone any misrepresentations. In fact, there is no evidence that JANET HARVEY did anything more than sign the spousal consent for the sale."

Choi does not contend that Janet Harvey personally made any misrepresentations to himself. Rather, he argues Janet Harvey should be liable, because Edward Harvey made the misrepresentations as her *agent*.

Agency is a question of fact. (*Leno v. Young Men's Christian Assn.* (1971) 17 Cal.App.3d 651, 657.) We consider first whether there was substantial evidence to support the conclusion that Edward Harvey did not make the statements as Janet Harvey's agent. We then address the significance of the trial court's failure to make a specific finding on the agency issue.

1. Substantial Evidence

An agent is one who represents a principal in dealing with third parties. (Civ. Code, § 2295.) Agency may be actual or ostensible. (Civ. Code, § 2298.) There is no evidence Janet Harvey expressly made Edward Harvey her agent in the subject transaction, and no basis for finding an actual agency. (See Civ. Code, § 2299.) Ostensible agency arises where "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.)

Substantial evidence supports the conclusion that Edward Harvey was not acting as Janet Harvey's agent in misstating the revenues of his dental practice or representing in the Contract that the figures were accurate. Under the Contract, Edward (and his corporation) was the principal. He (and his corporation) was identified as the seller.

Janet Harvey was not mentioned. The subject of the transaction was the sale of a dental practice, operated and managed by Edward Harvey.[2]

Choi again refers us to the evidence that Janet Harvey signed the Spousal Consent, agreed with her husband's plan to sell his practice, and accepted and retained the benefits of the transaction. By this, he maintains, Janet Harvey agreed to the terms of the Contract and thereupon undertook the burden to read the Contract and investigate its accuracy. We find this evidence unpersuasive. And, even if this evidence were probative of the agency issue, our role is not to reweigh the evidence before the trial court, but merely to confirm that substantial evidence supports the trial court's decision. We conclude it does.

In a case relied upon by Choi, *Lovetro v. Steers* (1965) 234 Cal.App.2d 461, 474-475 (*Lovetro*), the defendants executed a promissory note for $25,000 to Mr. and Mrs. Lovetro, payable in monthly installments of $500. (*Id*. at p. 466.) Mr. Lovetro later signed a release for all but $2,000 on the note, in consideration for forgiveness of a personal debt Mr. Lovetro owed the defendants. He signed both his own name and her name, without her knowledge or consent. (*Id*. at p. 466.) After Mr. Lovetro died, Mrs. Lovetro sued the defendants for recovery of half her interest in the balance, claiming she was not bound by her husband's release. (*Id*. at pp. 465-466.) The defendants claimed the debt was community property and that Mr. Lovetro acted as the ostensible agent for his wife and therefore his release was binding on her. (*Id*. at p. 467.) The trial court agreed. (*Id*. at p. 467.)

The Court of Appeal concluded that substantial evidence supported the trial court's findings. In particular, the court ruled that Mr. Lovetro had authority as a matter

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[2] To the extent it could be argued that Edward Harvey was acting as Janet Harvey's agent for the purpose of disposing of any share or interest Janet Harvey had in the community assets of the dental practice, the scope of the agency would be limited to the disposition of this community property interest. It would not compel judgment against Janet Harvey individually for Edward Harvey's wrongdoing; the community's liability was established by the finding that the community estate would be responsible for the judgment against Edward.

of law, as the husband, to execute the release. (*Lovetro, supra,* 234 Cal.App.2d at p. 473.) The court then proceeded in dictum to the issue of ostensible agency, relevant here. (*Id*. at p. 474.) Evidence that Mr. Lovetro took care of all the business affairs during the marriage, he had arranged all of the details of the note, Mrs. Lovetro knew of the nature of the note and that payments were to be made yet failed to inquire when she became aware the installments were not being made, "was sufficient . . . to warrant the inference that [the husband] had authority to execute the aforementioned release and agreement on [the wife's] behalf." (*Id*. at p. 477.)[3]

Choi suggests that Edward Harvey arranged the details of the Contract containing the misrepresentations, and Janet Harvey knew of the negotiations yet made no effort to make sure her husband was accurately representing the practice or to dispel any notion he was authorized to act on her behalf. Nevertheless, Choi's attempt to analogize to *Lovetro* is unavailing. In the first place, the court in *Lovetro* did not make the wife *individually* liable for her husband's representations, as Choi asks us to do here. It merely precluded her from avoiding the effect of his actions on the assets of the spousal *community*. In this matter, Janet Harvey's community interest in the sale proceeds is subject to liability, pursuant to the court's order under Family Code section 910. Moreover, the appellate court in *Lovetro* merely concluded that there was substantial evidence to *support* the trial court's ruling. By no means did it dictate that evidence akin to what was offered in *Lovetro* necessitated a finding of ostensible agency. Likewise, even if the evidence in the matter before us *could* reasonably lead to the conclusion that Edward Harvey acted as

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[3] Choi notes that the court stated: "In the case of dealings which involve a husband and wife, it is well established that an agency cannot be implied from the marriage relation alone. [Citations.] However, it is also true that much less evidence is required to establish a principal and agent relationship between husband and wife than between nonspouses. [Citations.]" (*Id*. at p. 475.) If there is a lower evidentiary threshold, it was not met here. (See also Fam. Code, § 1000, subd. (a) [a married person is not liable for injury or damage caused by the spouse except where the married person would be liable therefore if the marriage did not exist].)

Janet Harvey's agent, it also supports the contrary conclusion—reached by the court—as well. Consistent with *Lovetro*, we will uphold the trial court's determination.

2. The Trial Court's Omission of a Finding on the Agency Issue

Choi points out that his objections to the tentative statement of decision included the omission of factual and legal findings on the agency issue, but the trial court failed to include such findings in the final statement of decision. The failure of the trial court to make findings on a material issue such as this, he argues, is reversible error. (*Mitidiere v. Saito* (1966) 246 Cal.App.2d 535, 539.)

We disagree. The finding on agency is implicit from the court's findings on the breach of contract and negligent misrepresentation claims. The failure to make an express finding on a material issue is harmless when the missing finding may be found implicit in other findings. (*McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 996; *Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 643.) Further, we note that the trial court, at a hearing on Janet Harvey's motion for judgment after the conclusion of Choi's case in chief, stated: "I don't think the doctor was . . . acting as the agent of Mrs. Harvey in this sale." Although this oral remark may not itself satisfy an obligation to make a formal finding, it does demonstrate further that any error in omitting a formal finding was harmless.

Choi has failed to establish reversible error with respect to his cause of action for negligent misrepresentation.

C. JANET HARVEY'S LIABILITY FOR UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

Choi next contends the trial court should have imposed a constructive trust upon Janet Harvey's assets in the amount of the sales proceeds, because she was unjustly enriched by her receipt and retention of them. Although the second amended complaint did not allege a separate cause of action for unjust enrichment, the prayer did include a request that the defendants be made constructive trustees of the $523,500 Choi paid for the practice.

Imposition of a constructive trust requires a res, the plaintiff's right to the res, and the defendant's acquisition of the res by a fraud or other wrongful act. (Civ. Code, § 2223 ["One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."]; Civ. Code, § 2224 ["One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."].) Thus, if the acquisition of property was wrongful and the defendant's retention of it would constitute unjust enrichment, the plaintiff is entitled to a constructive trust on the property. (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116.)

In this case, Choi did not prove that Janet Harvey committed any wrongdoing in obtaining any portion of the sale proceeds. Nor can it be said that a constructive trust should be imposed in the amount of the $523,500 purchase price, as Choi requested, since neither Janet Harvey nor the marital community was unjustly enriched in that amount.

At most, it could be said that the acquisition of the sales proceeds by the *community* was wrongful, based on Edward Harvey's fraud. The community was not unjustly enriched by the entirety of the purchase price but, arguably, only to the extent of the $47,810 in proven damages and prejudgment interest, a sum the judgment holds the community estate liable for under Family Code section 910. Furthermore, Choi sought the constructive trust remedy in his second amended complaint as an *alternative* to damages, and characterizes it in his trial brief as "[a]n alternative basis of recovery." The trial court did not err in declining to impose a constructive trust on the property of Janet Harvey as well.[4]

In sum, Choi has failed to establish error in the judgment as to Janet Harvey.

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[4] Accordingly, any error in failing to find that Janet Harvey was unjustly enriched, or in failing to make a finding on that matter at all, is harmless.

D. ATTORNEY FEES ORDER

We turn next to the order awarding Janet Harvey contractual attorney fees as the prevailing party under Civil Code section 1717. Civil Code section 1717, subdivision (a), provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Choi contends that the order awarding attorney fees to Janet Harvey was erroneous because: (1) the Contract did not provide for a fee award in litigation between herself and Choi; (2) she was not a prevailing party; and (3) there was insufficient evidence to support the damage award.

1. The Attorney Fee Provision

The attorney fee provision of the Contract reads: "Should any litigation and or arbitration be commenced between the parties to this Contract concerning the assets, this Contract, or the rights and duties of any party in relation thereto, *the party or parties, (Seller, Buyer or Broker), prevailing in any such litigation* and or arbitration shall be entitled to recover from the other party(s), in addition to the relief awarded the prevailing party(s) in any such litigation and or arbitration, all court costs, investigation expenses, and reasonable attorneys' fees as determined by the court and or arbitration, or in a separate action brought for that purpose, including appellate proceedings and proceedings in bankruptcy, incurred by the prevailing party in such action (a dismissal, with prejudice, by the party commencing such action, shall be deemed to be a judgment in favor of the other party for the purpose of this Section). *Buyer, Seller and Broker shall each be considered a party for the purposes of this provision*." (Italics added.)

Choi argues that the description of a prevailing party in the attorney fee provision precludes the attorney fee award. The phrase "party or parties, (Seller, Buyer or Broker), prevailing" suggests that only the seller, buyer, or broker can be prevailing parties. The Contract defines "Buyer" as Choi, and "Seller" as "Edward L. Harvey D.M.D. and

Edward L. Harvey D.M.D., Inc." Thus, Choi contends, Janet Harvey was not a seller or buyer and not a prevailing party entitled to attorney fees. Furthermore, the last sentence of the attorney fee clause reads: "Buyer, Seller and Broker shall each be considered a party for purposes of this provision." If it had been intended for Janet Harvey to benefit from the attorney fee clause, Choi argues, she would have been identified as a person to whom the provision applied.

The fact that Janet Harvey was not identified in the attorney fee provision does not end our inquiry, however. Civil Code section 1717 provides that "the party who is determined to be the party prevailing on the contract, *whether he or she is the party specified in the contract or not*," is entitled to recover attorney fees and costs. (Italics added.) Thus, Civil Code section 1717 has been held to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract *as if* a party, where the plaintiff would have clearly been entitled to attorney fees if he had prevailed in enforcing the contractual obligation against the defendant. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds*).)[5]

Choi emphasizes that the rule in *Reynolds* applies only when the *plaintiff* (the contractual party) would also be clearly entitled to attorney fees if he had prevailed in the action. He insists that the Contract did not entitle him to recover fees against Janet Harvey, so she is not entitled to recover her attorney fees against Choi. Stated differently, because the contractual fee provision was not intended to benefit or burden Janet Harvey, it did not create any lack of mutuality of remedy, and Civil Code section 1717 should not apply. (See *Sessions Payroll Management, Inc. v. Noble Construction*

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5 In *Reynolds*, our Supreme Court explained: "Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party . . . and to prevent oppressive use of one-sided attorney's fees provisions. [Citation.] [¶] Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds*, *supra*, 25 Cal.3d at p. 128; see *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 633-634.)

Co. (2000) 84 Cal.App.4th 671, 679-681 [signatory to a contract could not recover its attorney fees against a nonsignatory, where the nonsignatory could not have recovered its attorney fees against the signatory] (*Sessions*); see also *Reynolds*, *supra*, 25 Cal.3d at p. 130 [statutory right to recovery of fees under Civ. Code § 1717 can be no greater than the contractual right].)

For several reasons, we must reject Choi's contentions. First, while Choi now urges he could not have obtained attorney fees from Janet Harvey if he had prevailed against her, he *sought to recover attorney fees from her* in his second amended complaint. This allegation does not literally estop Choi from now denying he could have recovered fees from her, since the pertinent question is not whether he pled a right to attorney fees but whether he would be entitled to them. (See *Sessions*, *supra*, 84 Cal.App.4th at p. 681.) Nevertheless, it does reflect Choi's understanding of the intent and meaning of the contractual fee provision. Assuming as we must that Choi asserted entitlement to attorney fees against Janet Harvey in good faith, we must also conclude that his understanding of the contractual fee provision was consistent with that position.

Other allegations of Choi's pleading also lead us to believe that Janet Harvey could have been liable for attorney fees if Choi had prevailed on his causes of action against her. Choi alleged that Janet Harvey had obligations as the *seller* under the Contract, claiming essentially that she was a principal in the transaction, a party to the Contract, and liable for the performance of obligations as the "Seller." For example, the second amended complaint reads: "Pursuant to the terms of the Agreement, *defendants* were obligated to, among other things, deliver to DR. CHOI a dental practice in conformance with the representations" alleged. Further, Choi alleged, "Defendant*s*" had "breached the Agreement" and sought damages resulting from "*defendants'* breaches of the Agreement." By proving these allegations, he could have obtained attorney fees from Janet Harvey under the Contract.

We are mindful as well that Choi still vigorously argues that Janet Harvey should have been liable under his contract claim as a party to the Contract. Recognizing the apparent contradiction between his assertion that Janet Harvey was a party to the

Contract in terms of its misrepresentations, but not a party for purposes of obtaining attorney fees, he attempts to explain: "Choi's position is that, by virtue of Janet Harvey's execution of the addendum agreeing to the Contract, she agreed to its terms. One of the terms of the Contract is that certain specified parties that do not include Janet Harvey are entitled to recover their attorney fees and costs in certain types of litigation between or among them."

In light of the record, Choi's argument is unpersuasive. The idea that Janet Harvey decided to take on the obligations of the Contract as a party to the agreement, but forego the right to obtain attorney fees as a party to the agreement, is neither reasonable nor supported by the evidence. Moreover, Choi did *not* merely argue that Janet Harvey agreed to the Contract *terms*, but that she was responsible for performing its covenants and liable for their breach. By his attempt to hold her liable as the seller, Choi exposed himself to liability for her attorney fees if he failed to prove his allegations.

Choi argues in his reply brief that "[s]ince [Janet Harvey] is not defined as a party in the fee provision, and is not an assignee of any of the defined parties, the only way she could have standing to claim under the fee provision is as a third party beneficiary." Not true. Her right to attorney fees is not based on entitlement to the benefits of the Contract as a third-party beneficiary, but based on Choi's contention that she was liable as a party to the Contract and the principle of reciprocity under Civil Code section 1717.

The attorney fee provision is consistent with the court's award of attorney fees to Janet Harvey.

2. Prevailing Party

In determining whether Janet Harvey was a "prevailing party" within the meaning of Civil Code section 1717, we review the court's decision for an abuse of discretion, and note the trial court's discretion in this regard is particularly broad. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158 (*Sears*); *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn*. (1991) 231 Cal.App.3d 1450, 1456.)

A determination of "prevailing party" under Civil Code section 1717, subdivision (b)(1), requires "'a comparison of the extent to which each party ha[s] succeeded and

failed to succeed *in its contentions*.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*), italics added.) If a party has an unqualified win (i.e., the defendant has defeated all the claims against him, as in *Hsu*), the trial court has no discretion to deny the party attorney fees as a prevailing party under Civil Code section 1717. (*Hsu*, *supra*, at p. 876.) But when a decision on a contract claim does not represent a "'simple, unqualified win'" for either party, but is considered "'good news and bad news to each of the parties,'" the trial court has discretion to rule that neither party prevailed on the contract. (*Id*. at pp. 874, 877.) In deciding whether there *is* a party prevailing on the contract, the trial court must "compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Id*. at p. 876.) Therefore, a prevailing party determination is an examination of the extent to which each party obtained what it sought.

In the matter before us, there was one contract claim asserted against Janet Harvey, and on that claim she won. As our Supreme Court has decreed, "when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law." (*Hsu*, *supra*, 9 Cal.4th at p. 876.) On this basis, Janet Harvey is the prevailing party.

Furthermore, we note that the trial court's determination that Janet Harvey was the prevailing party was at least within the court's *discretion* under Civil Code section 1717.[6]

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6 In granting the motion for attorney fees, the court stated: "[T]he Motion of Defendant JANET HARVEY for Attorneys' Fees is hereby granted in the amount of $65,000 based upon the Court's findings that *there was no simple unqualified win by either party and the Court's exercise of discretion to find that defendant JANET HARVEY is the prevailing party* pursuant to *Jackson v. Homeowners Assn.* [*v.*] *Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, because plaintiff did not limit his theories of recovery to a determination that defendant JANET HARVEY's share of the community assets are liable for any judgment recovered by plaintiff in this action against defendant EDWARD L. HARVEY and for over two years alleged that defendant JANET HARVEY was a party to the contract; and that since the contract contains an attorneys' fee clause,

In this regard, Choi urges, although Janet Harvey was successful in avoiding individual liability for breach of contract or negligent misrepresentation, he was successful in obtaining a finding of liability for breach of the Contract by Edward Harvey to the extent of Janet's community property interests. Choi insists that the trial briefs, opening statement, trial proceedings, and settlement discussions with Janet Harvey's attorneys, all demonstrate that the basis of liability found by the trial court was one of the theories he pursued. In fact, Choi claims, his *primary* litigation objective against Janet Harvey was to make certain her share of the community assets would be liable for the judgment. In particular, he was concerned with the uncertainty of Family Code section 910, caused by inconsistent legal authorities, as to how he could most effectively pursue this objective.

We first point out that Choi's pleadings, governing the litigation since its inception in March 1999, did not refer to Family Code section 910 or his desire to merely secure the ability to collect from Janet Harvey. Nor did he plead a cause of action for declaratory relief seeking a finding that Janet Harvey's community property interest was liable for Edward's conduct. Instead, Choi alleged that Janet and Edward Harvey were agents for one another and ratified and approved each other's acts. It was also alleged in the second amended complaint that "DR. *and MRS. HARVEY* warranted, represented, and agreed . . . that [¶] . . . all financial data concerning the Practice . . . provided to the Buyer and Broker are . . . an accurate representation of the financial status of the Practice . . . ." His pleading asserted that "defendants," including Janet Harvey, should be liable due to her breaches of the Contract. It also alleged that Janet Harvey had an affirmative duty to "confirm the accuracy of the representations made in the Agreement and did not make the required disclosures of discrepancies, but instead executed the Agreement . . . ." Thus, it cannot be said that the operative pleading at trial suggested that Choi's primary concern was to secure Janet Harvey's share of the community assets.

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pursuant to *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, defendant JANET HARVEY is entitled to recover her attorneys' fees from plaintiff." (Italics added.)

Choi's initial trial brief did not mention Family Code section 910 either. Instead, it sought to establish Janet Harvey's liability based upon the Spousal Consent and a theory that Edward Harvey was "acting as the agent of JANET HARVEY in connection with the sale of the practice." Choi's supplemental trial brief continued this position. Only in the last paragraph of the supplemental brief did Choi invoke Family Code section 910. And, contrary to Choi's assertion in this appeal, his attorney's opening statement did *not* mention holding Janet Harvey liable for Edward Harvey's fraud to the extent of her community property interests. Nor did counsel reference Family Code section 910 at all. Rather, she told the court that Choi purchased the practice "from defendant*s* based upon *their* affirmative misrepresentations" and "the defendant*s*' failure to disclose a number of material facts."

The trial court did not abuse its discretion in concluding that Janet Harvey was the prevailing party on the Contract.

3. Evidence Regarding Fees

The trial court granted Janet Harvey $65,000 in attorney fees, after disallowing fees she had requested for her first attorney, as well as fees for her unsuccessful opposition to Choi's appeal concerning his motion for joinder in the dissolution action, and after reducing hourly rates and amounts for certain entries.

Choi contends that much of the contents of the declarations supporting the fee request were inadmissible and, in any event, failed to provide evidentiary support for the fees awarded. In particular, he argues, there was a lack of evidence from which the trial court could determine whether the requested fees related to contract issues, to noncontract claims, or to issues common to both.

As a general matter, the prevailing party may recover attorney fees under Civil Code section 1717 only to the extent they relate to a contract cause of action. (*Reynolds*, *supra*, 25 Cal.3d at p. 129.) Where noncontract causes of action are asserted as well, the fees usually must be apportioned between contractual and noncontractual claims. (*Ibid*.) But apportionment is not required where the fees were "incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they

are not allowed." (*Id*. at pp. 129-130.) Nor is apportionment required when the causes of action are "'inextricably intertwined.'" (*Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1308; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 (*Abdallah*).)

Janet Harvey's liability under both the breach of contract and negligent misrepresentation causes of action was pursued on the theory that Edward Harvey was acting as her agent. The agency issue was, therefore, common to both the contract claim and the noncontract claims. Attorney fees attributable to agency issues could properly be recovered under Civil Code section 1717.

Moreover, the proof relevant to the negligent misrepresentation cause of action was substantially the same as that required on the contract claim: both alleged that the financial information and related circumstances of Edward's practice were misrepresented. Fees incurred with respect to Edward's representations, their truth or falsity, causation, and damages as to the contract claim would be germane to the negligent misrepresentation cause of action as well. Indeed, Choi sought attorney fees against both defendants on all causes of action. (See *Abdallah*, *supra*, 43 Cal.App.4th at p. 1111.)

Lastly, while Choi insists the evidence was insufficient to prove the recoverability of the requested fees, Janet Harvey's counsel submitted a supplemental declaration setting forth a detailed description of services rendered and the corresponding fees and time spent on each. Although it was not always apparent from this documentation whether the services were rendered with respect to the contract claim, a noncontract claim, or an issue common to both, the extensive overlap between the contract and noncontract claims render this fact relatively insignificant. The trial court has broad discretion to award attorney fees in an amount it believes to be reasonable under the circumstances. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624-626.) The court awarded only $65,000 of the $235,739.20 requested, and Choi has not established that the court abused its discretion in this regard. (See *Abdallah*, *supra*, 43 Cal.App.4th at p. 1111.)

E. ORDER DENYING CHOI'S MOTION TO STRIKE OR TAX COSTS

Choi contends that the order denying his motion to strike or tax costs was erroneous, because Janet Harvey was not the prevailing party under Code of Civil Procedure section 1032 and because certain costs were not allowable.

1. Prevailing Party

Code of Civil Procedure section 1032, subdivision (b), provides that, except as otherwise expressly allowed by statute, a prevailing party is entitled as a matter of right to recover its costs of suit. A "prevailing party" for this purpose is not defined the same as a "prevailing party" for purposes of Civil Code section 1717. Rather, Code of Civil Procedure section 1032, subdivision (a)(4), provides that the prevailing party in this context "includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." In other situations, the prevailing party shall be as determined by the court, in which case the court may allow costs in its discretion. (Code Civ. Proc., § 1032, subd. (a)(4).)

Choi contends that he, not Janet Harvey, was the prevailing party within the meaning of Code of Civil Procedure section 1032, subdivision (b), because she was held liable pursuant to Family Code section 910 for any judgment entered against Edward Harvey. Choi is incorrect. The court did not hold Janet Harvey liable; it found that the *community estate* would be liable for the judgment against Dr. Harvey. The judgment reads: "Plaintiff, MARK CHOI, *shall take nothing* from Defendant, JANET HARVEY and [the court] finds in favor of Defendant, JANET HARVEY, together with her costs of suit incurred herein." (Italics added.) This placed Janet Harvey squarely within the definition of a prevailing party under Code of Civil Procedure section 1032 or, at least, imbued the trial court with discretion to deem her the prevailing party and award her costs.

In any event, apart from Code of Civil Procedure section 1032, Janet Harvey would be entitled to recover her costs under Civil Code section 1717 and the Contract.

As mentioned, the Contract contains language that the "prevailing party" in litigation "between the parties to this Contract" "shall be entitled to recover from the other party(s) . . . all *court costs*, investigation expenses, and reasonable attorneys' fees as determined by the court . . . ." (Italics added.) Regardless of who might be a prevailing party under Code of Civil Procedure section 1032, therefore, the Contract itself entitles Janet Harvey to recover her costs in defending against Choi's attempt to impose liability upon her as a seller under the Contract. (See *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1249 [prevailing party under contract and Civ. Code § 1717 entitled to recover costs, whether or not a prevailing party under Code Civ. Proc. § 1032].)

2. Challenged Costs

In her memorandum of costs, Janet Harvey sought recovery of $7,308.57 for deposition transcripts. Deposition costs may be recovered under Code of Civil Procedure section 1033.5, subdivision (a)(3), which refers to: "Taking, videotaping, and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions."

Choi argues that the depositions at issue were not taken by Janet Harvey and, for the most part, not taken "by the party against whom costs are allowed"—in this case, Choi. Therefore, he maintains, nearly $6,000 of the transcript cost is not allowable under Code of Civil Procedure section 1033.5, subdivision (a).

We must disagree, for two reasons. First, Code of Civil Procedure section 1033.5, subdivision (a)(3), allows deposition transcription costs, "*including*" the cost of an original and a copy for depositions taken by (in this case) Janet Harvey and the costs of a copy for the depositions taken by Choi. The subdivision does not necessarily *preclude* transcription costs for a copy of depositions taken by a codefendant. Second, Code of Civil Procedure section 1033.5, subdivision (c)(4), reads: "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." Even if transcripts of depositions taken by a codefendant are not specifically allowed under Code of Civil Procedure section 1033.5, subdivision (a)(3), they certainly

fall within Code of Civil Procedure section 1033.5, subdivision (c)(4). The court did not abuse its discretion in awarding these deposition transcript costs.

Janet Harvey also recovered $1,650 in payments to the Judicial Arbitration and Mediation Services (JAMS). Choi contends these expenses were for a discovery reference and a private mediation. The charges for both totaled $6,600, of which Choi paid $3,300. It appears Janet and Edward Harvey split the balance, and Janet seeks to recover her share. The discovery reference was made to resolve Choi's motion for a protective order in response to deposition subpoenas Edward Harvey served on his transactional attorney and tax attorney/accountant, and Edward Harvey's motion for protective order as to Choi's depositions of Edward Harvey and his transactional attorney. Janet Harvey did not join in these motions and was not ordered to participate in the discovery reference. Choi argues that her decision to share in Edward Harvey's one-half of the cost of the reference was entirely voluntary and unnecessary to her defense. He further contends the mediation was voluntary by agreement of all parties.

Code of Civil Procedure section 1033.5 does not state whether fees for discovery references or mediation costs are recoverable by parties whose participation has not been ordered by the court. We therefore return to Code of Civil Procedure section 1033.5, subdivision (c)(4), which permits an award for such items in the court's discretion. While we may have ruled differently for the reasons Choi sets forth, we cannot say the trial court acted arbitrarily or irrationally in concluding the costs were reasonably necessary to the conduct of Janet Harvey's defense and allowable under Code of Civil Procedure section 1032. We must therefore conclude the trial court did not abuse its discretion.

Lastly, Choi has not demonstrated that it would be error to award these costs, or the deposition transcript costs, pursuant to the terms of the Contract. His argument that costs cannot be recovered under a contractual provision unless specifically pled and proved at trial is misplaced. In *First Nationwide Bank v. Mountain Cascade, Inc*. (2000) 77 Cal.App.4th 871, the court held that plaintiffs could not recover their expert witness expenses at a posttrial cost hearing under a contractual provision entitling them to the

"necessary expenses" of litigation, where they had not specially pled their right or proven their entitlement during the jury trial. (*Id*. at pp. 878-879.) There, the court recognized the possibility of a factual dispute as to whether expert witness fees would be considered "necessary expenses" within the meaning of the contract. (*Ibid*.) In the present appeal, by contrast, the items Janet Harvey sought as costs would ostensibly fall within the meaning of the term "court costs" in the attorney fees provision in the Contract, and there is no assertion in this appeal to the contrary.

Choi has failed to establish error in regard to the order imposing attorney fees and costs.

III. DISPOSITION

The judgment and order are affirmed.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.